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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1950~~ 51

No. ~~615~~ 19

THE UNITED STATES OF AMERICA,
Appellant,

vs.

OREGON STATE MEDICAL SOCIETY, OREGON PHYSICIANS SERVICE, CLACKAMAS COUNTY MEDICAL SOCIETY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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CLARENCE D. PHILLIPS,
JOHN J. COUGHLIN,
Counsel for Appellees.

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THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Civ. No. 4255

THE UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

OREGON STATE MEDICAL SOCIETY, ET AL,
Defendants-Appellees.

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM

In opposition to appellant's statement as to jurisdiction and in support of their motion to dismiss or affirm, appellees submit the following:

I. Introductory Statement

As appears from appellant's statement, the doctors of Oregon are charged with having entered into a conspiracy commencing January 1, 1936, and continuing to the present time, to destroy organizations known as commercial "Hospital Associations", that by so doing they have restrained interstate trade and commerce; and also that organizations composed of Oregon doctors contracting to provide medical services on a prepaid basis have agreed not to compete with each other, thereby also restraining trade and commerce among the several states.

In its statement of Questions Presented and also under the heading "The Questions are Substantial" appellant for some reason assumes the truth of certain charges which are in fact not true, charges which the trial court found were not proved. (See Findings 20, 21; Opinion, pp. 1-2.) This is particularly true of its assumption that appellees have engaged in "a boycott and other collective action in restraint of trade" and "of the kind prohibited by the Sherman Act", and its reference to "defendants' conduct in restraint or monopolization of prepaid medical care organizations operating in the State of Oregon".

Such unwarranted assumptions, it seems to us, result in not only an inadequate but a distorted presentation of the "major questions" involved. We believe this will become evident upon a consideration of some of the facts to be hereinafter briefly related.

II. The Interstate Commerce Feature

(a) *Is the Practice of Medicine "Commerce"?*

In *United States* v. *National Association of Real Estate Boards*, 339 U.S. 195, the court held that the occupation of a real estate broker was "trade" within the meaning of sec. 3 of the Sherman Act. Theretofore the court had held that the meaning of the words "trade" and "commerce" as used in sec. 3 was much broader than the meaning of the same words in sec. 1. *Atlantic Cleaners and Dyers* v. *United States*, 286 U.S. 427. In the Real Estate Boards' case, the court reserved for decision whether the practice of a profession was trade within the meaning of sec. 3. The constitutional grant of power under which Congress passed sec. 1 is to regulate commerce (not trade) among the several states. It is our position that the practice of medicine is not trade; and it certainly is not commerce within the meaning of the constitutional grant of power to Congress.

The practice of a profession involves not only the rendering of services but the sale of those services. And when, as in this case, organizations of doctors sell their own services, the sales are themselves only incidental to the rendering of the services and can no more be called trade or commerce than the services themselves.

(b) *Interstate Aspects of the Case*

Appellant's statement, under paragraph (2) of the subdivision "The Questions are Substantial", correctly summarizes the facts with respect to alleged interstate commerce. Under those facts the most that appellant can, and does, say is that interstate commerce is "affected", not that it is restrained. It is even doubtful that it is affected. Appellant points out that (1) under some contracts an Oregon resident contracting for prepaid medical care is entitled to have medical care paid for even while in other states, that (2) some Oregon residents entitled to the benefits of such contracts are themselves engaged in interstate commerce, that (3) "needed supplies" are procured from other states, that (4) some of the organizations contracting for such medical care have employees both in Oregon and other states, and (5) such organizations regularly transmit policies, sums of money, etc., across state lines.

Appellant cites *United States* v. *Southeastern Underwriters' Association*, 322 U.S. 533; but the business of insurance, as the court there pointed out (322 U.S. at 541), differing from the practice of medicine, "is not separated into 48 distinct territorial compartments which function in isolation of each other". A large insurance company provides insurance throughout the United States; but the Oregon doctors do not practice in other states. It is true that protection of prepaid medical contracts is afforded contract holders while in other states, but this is purely incidental;

and nothing that the government charges appellees with having done could conceivably affect that aspect of prepaid medical care.

This case rather is governed by such decisions as the *Industrial Association of San Francisco* v. *United States*, 268 U.S. 64; *Levering and Garrigues Company* v. *Morrin*, 289 U.S. 103; *Apex Hosiery Company* v. *Leader*, 310 U.S. 469; and *United States* v. *Yellow Cab Company*, 332 U.S. 218, 230-2; 338 U.S. 338.

III. Oregon Doctor's Controversies With Commercial Hospital Associations

The following facts are clearly established by the evidence, largely documentary:

(1) The business of so-called hospital associations, particularly as they operated in Oregon prior to 1941, was markedly different from that of Group Health, Inc., involved in the American Medical case. It was the practice of these hospital associations, operated for, and making, large profits, to enter into contracts with employers throughout the State of Oregon in which they agreed to provide medical services to employees. This, in any given locality, was often done without the prior knowledge or consent of the doctors of the community. The associations were managed by lay "managers". After entering into such a contract, the hospital association employed one or more doctors to care for the patients that theretofore had been cared for by all the doctors of the community. Some of the doctors in Portland were on salary; others were paid as they rendered service. When any such patient went to a hospital association doctor (particularly if the doctor were not on salary), the doctor by direction of the hospital association was usually required to report to the hospital association and was required to obtain specific approval

before performing an operation or rendering any extensive services. If the patient was elsewhere than in Portland and extensive treatment was foreseen, orders were given that he be moved to Portland to be cared for there by a doctor on salary. The hospital associations during and prior to the thirties refused to furnish fee schedules, except for house calls, office calls, and such matters, and almost routinely discounted statements for services rendered by doctors. In short, there was that constant domination by laymen of the doctor-patient relationship which, as courts have stated, inevitably leads to the degradation and debasement of the medical profession. See, e.g., *Barton* v. *Coddington Co.*, 68 S.D. 309, 2 N.W. 2d 337, 140 A.L.R. 550. See also, *United States* v. *American Medical Association*, 110 F. 2d 703, 714.

(2) Because of the above threats to, and in order to protect, their professional standards, members of appellee Multnomah County Medical Society, beginning in 1936, expelled some doctors from membership for their cooperation in the above practices. They first reminded such doctors that their conduct was contrary to the society's code of ethics to which they had agreed to conform, and urged them to abandon their unprofessional practices. No doctor, however, was ever expelled or threatened with expulsion merely because he "took tickets"—an expression hereinafter defined. The refusal to take tickets is the principal charge made by the government against the doctors now. Appellant is in error in stating, in the fourth paragraph of its "Statement", that the State Society declared that billing or accepting a check from a hospital association was ground for disciplinary proceedings. What appellant evidently has in mind is an attorney's opinion distributed by the State Society in the spring of 1940 to the effect that such conduct could be considered as "some evidence" of unethical conduct.

(3) In 1940 the above disciplinary proceedings in Multnomah County entirely ceased. They have been permanently abandoned. There is neither threat nor intent that they be resumed. Neither before nor after that date have any such proceedings ever been carried on elsewhere in the State of Oregon.

(4) Beginning about 1940, the hospital associations changed their methods of doing business, so that instead of having limited panels of doctors working for them in treating subscribers they purported to give them the right to treatment by doctors of their own choice. This both the hospital associations and the doctors all agree was a great forward step in the public interest. One effect was that since subscribers of hospital associations were thereafter treated by doctors who had no agreements with hospital associations, the contracts of subscribers were actually indemnity agreements, not agreements to provide services. The new type of contract provides that while the associations reserve the right to make payment to doctors their obligation is only to the members, not to the doctors. And in connection with this change definite and comprehensive fee schedules have been adopted and distributed.

(5) In December, 1941, Oregon Physicians' Service was organized by Oregon State Medical Society. It is a corporation serving as an agency to provide, on a prepaid and non-profit basis, the services of such of the doctors of Oregon who are members of or eligible to membership in any county society and care to affiliate with it.

(6) The refusal to accept from a patient a ticket issued by a hospital association as a requisition for medical service, to send bills to hospital associations and to accept their checks in payment is known as refusing to "take tickets". The principal charge of the government is that doctors in

Oregon by concert of action and conspiracy refuse to take tickets. The government makes this charge notwithstanding the fact that the presidents of the two leading hospital associations testified that it was a matter of indifference to them whether doctors did or did not take tickets; although on rebuttal one of them said he had changed his mind. The manager of one of the leading hospital associations testified, as he had theretofore written, that during the eighteen months ending in June of 1948, 1,400 doctors, chiropractors, dentists, and other practitioners of the healing arts, had taken tickets of his organization. Documentary evidence, introduced by the government, indicates that approximately 1,085 or more of these were doctors of medicine practicing in Oregon. In January, 1948, as the government's evidence discloses, but 952 doctors in Oregon were cooperating physicians of Oregon Physicians' Service—that is, "took tickets" of Oregon Physicians' Service. At the same time there were 1,660 licensed physicians in Oregon, of whom 1,210 were members of Oregon State Medical Society. Of course, the court should understand that large numbers of doctors in Oregon because of the nature of their practice or for other reasons have never had occasion to determine whether they should or should not "take tickets". The same manager testified that for the greater part of two years his staff, and government agents, had searched their records for evidence to be supplied the government. One result of these labors was a list of eighty doctors, each of whom government attorneys stated during some time since 1936 had refused to take tickets of at least two hospital associations. This seemed to be the best the government could do on this point, although at the trial there was evidence of some additional doctors whose names could have been added to the list. This is what the government calls "boycott".

(7) At no time since 1941 has any proposal been made by any medical society that any effort be made to induce doctors not to take tickets. None of the doctors who take tickets have, since 1940, been in any way discriminated against by any medical society. Many of them hold offices in their various societies, including Oregon State Medical Society and Multnomah County Medical Society.

(8) Many doctors who do not take tickets were witnesses in the case and stated that their reasons for refusing to do so were based upon their past experiences with those hospital associations, described above, or with the experiences of others which had come to their attention. No doctor in recent years has refused to take tickets because of any action by any medical society. One individual appellee, as a contributing editor of a doctor's publication, has strongly advised doctors not to take tickets or otherwise cooperate with commercial hospital associations. This was not the action of any medical society, or the result of any agreement. We do not mean to concede that if this had been done by all the appellees, acting in concert, there would have been any wrong. For, as the Court of Appeals pointed out in the American Medical case, the defendants even there were entitled to achieve their objectives if it could be done by resort to "legitimate persuasion and reasoned argument" instead of coercion. 110 F. 2d 703, 711-12, 130 F. 2d 233, 248. Or, as Mr. Justice Rutledge pointed out, speaking for the court in *Thomas* v. *Collins*, 323 U.S. 516, 537:

> "'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts."

(9) The complaint charges that doctors expelled from medical societies because of cooperation with hospital associations were not permitted to practice in hospitals, and

that through the action of defendants hospitals have refused to take patients who are subscribers of hospital associations. Though directed to do so by the court, the government has been unable to furnish the name of even one such doctor or patient. No doctor ever suffered any financial loss by reason of not belonging to a medical society (other than a slight increase in malpractice insurance premiums), nor has any doctor ever been kept from the staff of a hospital nor any patient ever refused hospital service either because of nonmembership in a society or because of cooperation with or membership in a hospital association.

In short, the evidence is conclusive that there has been no "conspiracy".

(10) During the period of the alleged conspiracy (from January, 1936, through 1948), the gross annual income of the two principal commercial hospital associations has increased from $707,672.00 to $2,572,562. During the latter part of this period, since 1941, these commercial hospital associations have had as active competitors the doctors' own prepaid medical care organizations, Oregon Physicians' Service and several county organizations of doctors.

IV. Lack of Competition Between Doctor-Sponsored Organizations

Even prior to 1936 there had been local organizations of doctors for the purpose of providing their services on the prepaid plan. In most instances all members of the local medical societies were invited to join in these endeavors. Thereafter others were formed. As pointed out above, Oregon Physicians' Service was organized in 1941. One of the two main contentions of the government is that these local groups do not compete with each other, and that Oregon Physicians' Service does not compete with any of them.

As the trial court appropriately pointed out, note 4, the patients in any given county will be cared for by the doctors of that county regardless of who purports to contract to provide those services. In each instance, the doctors in organizing to provide medical services on a prepaid basis are merely setting up a plan to provide their own services. It is obnoxious to members of the medical profession for others to endeavor to sell their services without their consent. Prior to 1941 this kind of brokerage of their services was one of the grievances of doctors against commercial hospital associations. For these and other obvious reasons doctors organized in "X" County do not send a representative into "Y" County for the purpose of selling prepaid medical care to the people of "Y" County—whether those medical services are to be rendered by the doctors of "X" County or of "Y" County. Neither does Oregon Physicians' Service without the consent of the doctors of "Y" County attempt to sell the services of those doctors to their own patients.

In order to arrive at an equitable division of the income among the doctors who are members of any prepaid medical care plan—whether statewide or local—it is necessary to have some kind of a yardstick, and this means something by way of a fee schedule. Also, if a patient who is entitled to service under the plan of the doctors of "X" County should become sick while in "Y" County and be treated by a doctor of that county, the "X" County organization, by agreement, pays the fees of the doctor rendering the services—and for this purpose it is desirable that the organizations of the two counties have an agreemen—a "fee schedule"—to govern such a situation. These are the fee schedules about which the appellant complains. The evidence discloses that there have been no fee schedules

in Oregon, at least for many years, governing the rendering of medical services generally.

All these activities of Oregon doctors, referred to by the government as illegal because lacking elements of competition, are necessary concomitants of efficient rendering of medical services to the public on a prepaid basis.

Absence of competition is also claimed by reason of certain alleged "policies" adopted by the State Medical Society. These policies are said to have limited doctor-sponsored prepaid medical care plans, by directing that they eliminate drugs and medicines from contract coverage, restrict coverage to individuals and not families, and provide prepaid medical care only to those within certain income limits. The fact is that neither local medical societies nor local doctor-sponsored plans are in any way bound by these so-called state policies—expressions of the members of the state council which vary from time to time. Nor have they followed them. Drugs and medicines were eliminated, except to patients in hospitals, not because of conspiracies or agreements but by outside forces. Commercial hospital associations have also eliminated drugs and medicines. With respect to income limitations, most doctors feel that low cost medical care on a prepaid basis—such as the type here involved—should be restricted to those in the low income groups, that in the higher income groups doctors should be free to charge in each individual case what amounts to a reasonable fee, taking into consideration not only the nature of the particular ailment but the ability of the patient to pay. But it is not true that through agreement doctor-sponsored plans have followed any pattern in this regard. In fact, every doctor-sponsored plan in Oregon to some extent covers individuals in the higher income brackets, and under varying conditions will agree to cover all members of the family.

Finally, since all these activities are entirely confined within the State of Oregon, not by the wildest stretch of the imagination can they be said to be restraining trade or commerce among the several cities. See in addition to cases cited above, *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211, 247; *Federal Trade Commission* v. *Bunte Brothers*, 312 U.S. 349.

Conclusion

For the reasons above stated, no substantial question is presented by this appeal. Appellees therefore respectfully move that this appeal be dismissed or that the judgment of the District Court be affirmed.

Respectfully submitted,

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